

In the United States
Circuit Court of Appeals
For the Ninth Circuit. 4

ERD V. CROWELL,

Appellant,

vs.

BAKER OIL TOOLS, INC., a corporation,

Appellee.

APPELLANT'S REPLY BRIEF.

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FILED

AUG 17 1938

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No. 8850.

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PRELIMINARY.

It is not true, as stated under an identical heading in Appellee's Brief, that appellant's argument is predicated upon the contention that the trial court erred in reaching its conclusions upon conflicting evidence; on the contrary, on the narrow issues involved on this appeal, there is no material conflict in the evidence. Neither is it true that appellant is relying upon fragmentary portions to the exclusion of other important parts of the record, nor that appellant seeks to enlarge or expand the terms of a written license by parol evidence.

Appellant's Opening Brief is relied upon as demonstrating the falsity of all such unapplied general assertions in the opening paragraphs of Appellee's Brief.

Appellee's Alleged Statement of the Case Is Fallacious. The Circumstances Set Forth in Pages 2 to 8, Inclusive, of Appellee's Brief Are Totally Irrelevant and Immaterial. Error Is Assigned [Assignment LVIII, Tr. 357, and Briefly Presented in Appellant's Opening Brief, p. 69] on the Admission and Consideration of Evidence of Such Circumstances.

The two cross-licenses involved on this appeal are dated August 1, 1935. Their execution and delivery was the result of a *compromise* of a prior controversy regarding a previous proposed license, namely that of 1934. It is expressly provided in one of these cross-licenses [Plaintiff's Exhibit 2, Exhibit Book, pp. 13-17, in paragraph 13 of said license]:

“THIS AGREEMENT ENTIRELY CANCELS AND RENDERS VOID AND OF NO EFFECT ALL PRIOR AGREEMENTS BOTH WRITTEN AND ORAL BETWEEN THE PARTIES.”

The principal issue on this appeal relates to an absence or failure of agreed-upon consideration by the practical nullification or denial of the cross-license to Crowell, resulting from the bringing of this suit charging infringement by Crowell because of the manufacture and sale by him of the devices described in Defendant's Exhibit E [Book of Exhibits, p. 143]. Accordingly, the discussion in Appellee's Brief under the heading “Statement of the Case,” pages 2 to 8, inclusive, is totally irrelevant. True, the parties had alleged contract relations from early in 1932 to August 1, 1935, and Crowell denied the binding

effect of the contract of August 7, 1934 [Plaintiff's Exhibit 1, Exhibit Book, p. 1], which presented an issue upon which appellee, Baker Oil Tools, Inc., might have brought suit against Crowell, BUT INSTEAD OF SO DOING, THE PARTIES COMPROMISED SUCH CONTROVERSY AND ENTERED INTO THE CROSS-LICENSING ARRANGEMENT OF AUGUST 1, 1935.

In such opening pages of appellee's "Statement of the Case," counsel seek, notwithstanding the above-quoted provision of paragraph 13 of Exhibit 2:

"THIS AGREEMENT ENTIRELY CANCELS AND RENDERS VOID AND OF NO EFFECT ALL PRIOR AGREEMENTS BOTH WRITTEN AND ORAL BETWEEN THE PARTIES,"

to revive this compromised controversy AND SUBSTITUTE A CONSIDERATION THEREOF FOR THE NARROW QUESTIONS PRESENTED ON THIS APPEAL.

The tactics on behalf of appellee in this case has been to create as much confusion as possible concerning prior negotiations, contracts, near-contracts and controversies between the parties, all of which, we contend (regardless of the merits of the contentions or equities involved on either side), are made entirely irrelevant by the express agreement above quoted from paragraph 13 of Plaintiff's Exhibit 2.

ARGUMENT.

Appellee begins the text of its argument by the statement that under the terms of Plaintiff's Exhibit 1 [Exhibit Book, p. 1], Crowell became obligated as soon as the Lorraine litigation was terminated in his favor, to execute a license to Baker. Now, the fact is that Crowell DEFINITELY REFUSED TO EXECUTE SUCH LICENSE. There is no doubt about Mr. Crowell's DEFINITE AND EMPHATIC (and we insist "righteous"—although the question of its propriety is not involved) REFUSAL to abide by the contract of August 7, 1934 [Plaintiff's Exhibit 1, Exhibit Book, p. 1]. This is expressed in unmistakable terms in Plaintiff's Exhibit 6, letter dated July 27, 1935, of Crowell to Mellin, Exhibit Book, page 73, beginning at the bottom of page 74, which reads as follows:

"Now, Mellin, if you make demand, as you intimated you would, that a certain prepared license agreement be executed, which I deny is fair and just, and deny the obligation to sign, I expect to contest it to the limit.

You and Sutter gave me the rush act to get this agreement signed,—it was Sutter's argument that Baker was anxious to terminate the litigation so that they could establish a new price list and get out new literature,—you both misrepresented the full implications in the agreement,—it was after you had prepared an amended complaint in my Lorraine case and had invoiced me for your services,—and with the anticipation of you representing me in the Lor-

raine case that I signed the agreement to settle pending litigation,—and with the expressed assurance from both of you that I was doing no more than terminating the present litigation.

I am ashamed that I have been took in,—however it was the result of misplaced confidence, and I am not going to stand hooked, and the quicker you see what you can do about it, the better.”

This was only four days before the execution of the cross-licenses of August 1, 1935.

We insist that if Crowell was WRONG in his refusal to “stand hooked” (as he very forcibly expresses it) by what he has always contended was an unconscionable contract (that of August 7, 1934, Plaintiff’s Exhibit 1) THEN CERTAINLY APPELLEE BAKER HAD A CAUSE OF ACTION AND MIGHT HAVE COMPELLED CROWELL TO EXECUTE SAID LICENSE; but instead of resorting to legal action, appellee Baker, through Mellin, *conceded* the righteousness of Crowell’s refusal to abide by said contract, and, to avoid litigation, COMPROMISED by the cross-licensing arrangement of Plaintiff’s Exhibit 2 and Defendant’s Exhibit A, Crowell giving appellee Baker a license and in turn taking a license from appellee Baker. THERE IS NO POSSIBLE QUESTION BUT THAT THESE CONTEMPORANEOUSLY EXECUTED LICENSES WERE PARTIALLY CONSIDERATION FOR EACH OTHER. Remember, Mellin has grudgingly admitted [bottom of Tr. 81 referring to said license, Defendant’s Exhibit A]: “I suppose in a sense it may be additional

consideration if you want to call it that”; and to avoid any possible continuing effect of the prior agreements—the parties in said Exhibit 2, as above pointed out, expressly cancelled said prior agreements with the clearly expressed intention that they should be *void and of no effect, whether they were oral or written*. The illogic of the argument on page 18 of Appellee’s Brief that because in prior negotiations and prior agreements or proposed agreements, a certain monetary consideration was referred to—and this as early as 1932—that Crowell was bound thereby and that the NEW AND DIFFERENT CONSIDERATION, including the cross-license from Baker to Crowell [Defendant’s Exhibit A, Exhibit Book, p. 129] could be ignored, and that whether valid or invalid, valuable or worthless to Crowell, was entirely immaterial, we believe, is quite obvious.

At the bottom of page 18, Appellee’s Brief, by discussing the alleged “temporizing” by Crowell, counsel are plainly attempting to revive prior agreements which were expressly terminated in Plaintiff’s Exhibit 2, Crowell license, Crowell to Baker, as above repeatedly reminded.

It Is Not True, as Asserted Near Top of Page 19, Appellee's Brief, That Crowell Stated He Was Fearful That If He Manufactured the Device of His Abandoned Application With a Cementitious Plug That Baker Would Sue Him Under Patent No. 1,859,648, and That to Quiet His Fears in This Respect, the Cross-License Was Granted to Him.

We have, in Appellee's Opening Brief beginning at page 18 thereof, fully refuted in advance any such contention as indicated in the above heading; and we have done this not by mere *assertion* with scant reference and no quotation from the record, but by full and detailed quotation and consideration of the evidence.

Counsel's unsupported assertion that Crowell stated that he was "fearful" that if he manufactured the device of his abandoned application with a cementitious plug, Baker would sue him, is not only glaringly contradicted by the facts, circumstances and admissions as we have set forth in our opening brief, but is further refuted by the very evidence to which counsel refers for its support, namely, by Plaintiff's Exhibit 6 [Exhibit Book, p. 73, Crowell's letter to Mellin] where, after preceding explanation at Exhibit Book, page 74, Crowell says:

"This is merely one of the reasons why I claim, as I told you, Claims 1, 3, and 7 of the Baker Patent No. 1,859,648 are too broad, and clearly anticipated by prior art,—and by a reference in the Patent Office.

Furthermore, and as I told you, I have an abandoned application in the Patent Office No. 5477, filed Jan. 29, 1925, having the following claim:

‘Well cementing means comprising well casing having discharge ports, spaced valvular means normally closing the bore of the casing to provide a chamber therebetween with said ports communicating therewith so as to permit material to flow down or up through the casing to said chamber and out of said ports without passage of the material through the bore of the casing past the ports.’ ”

The absurdity of any intimation that Crowell was contending for a license under said Baker patent because he was “fearful” that if he manufactured the device of his abandoned application, Baker would sue him, in the light of his unanswerable contention that certain, at least, of the subject-matter of said patent was clearly anticipated and void, will be apparent. What Crowell wanted a license to manufacture and sell was the device of Defendant’s Exhibit E.

Counsel play on the term “dual valves” as used by Crowell in said letter, Plaintiff’s Exhibit 6, where he says:

“I wish to call your attention to certain disclosures in this patent showing dual valves in the bore of the casing to control the expulsion of fluid through an intermediate port.”

—as implying that Crowell was interested in two separate spaced-apart and not connected-together valves, is easily refuted, because: First, the word “dual” has no such

narrow signification; Second, claim 5 of said Baker patent, as an instance (see comparison, page 56a, Appellant's Opening Brief) is not limited to two separate spaced-apart valves; and, Third, remember again, Mr. Mellin's admission concerning negotiations prior to entering into the cross-licenses during which Crowell explained to Mellin exactly what he wanted to manufacture and sell if granted the Baker license [Tr. 114]:

“Q. Will you swear positively that he said he was going to have two separate and independently operated valves, not joined together?

A. I don't think he was that specific, Mr. Westall. He said he wanted to make this with two valves. I don't recall just . . .”;

and Fourth, the dual-faced valve of Crowell's Exhibit E performs identically the same functions in identically the same way as the two separate ball valves of said Baker patent. At Tr. 251, Crowell makes this clear as follows:

“I understand the construction illustrated in Defendant's Exhibit C, Baker patent No. 1,859,648. Describing briefly the function of valve 21: Principally to act as a float valve on lowering the casing in the well, and incidentally to hold the cement outside of the casing after it was landed and cemented.

Comparing valve 21 of patent No. 1,859,648, particularly as to upper valve 21, with this upper surface of ball valve shown in Defendant's Exhibit E, as to function: They function exactly alike, and for floating in or cementing. As to whether valve 21 performs any other or different function than the

corresponding valve that I have referred to in Defendant's Exhibit E: No difference whatever.

As to function and effect of lower ball valve 26 in Baker patent No. 1,859,648: The intended effect of keeping the cement from running back into the casing, when it is cemented. The valve operates by falling on the seat below the peripheral port. It does that when the fluid is in static, provided it is heavier in specific gravity than the fluid it is floating in.

There is no indication in this patent anywhere whether it is light or whether it is heavy. There is no indication whatever in the patent that either one of these valves 21 and 26 are lighter or heavier than the other. As to how, assuming that they would both be of the same specific gravity relative to the cement, they would operate: Well, after the cementing operation, if the valve 21 is lighter than the cement it would be on the upper seat, and close the upper passageway, and if the valve 26 was of the same weight as the valve 21, it would be up off of the lower seat. The operation of the valve shown in Defendant's Exhibit E would be exactly the same as that just described.

As to how the two ball valves of Baker patent No. 1,859,648, namely, the ball valve 21 and the ball valve 26, were fastened together by a narrow rod would operate; that is, what would happen when you were floating the casing in: Both valves would be upwardly, the upper valve would seat and the lower valve would be unseated. During the pumping of the cement fluid down through the casing, the lower

valve would seat, and the upper valve would be unseated.

As to whether that operation would be any different if the two valves were of the same relative specific gravity as I have just described, whether they were fastened together, or whether they were separate: There would be absolutely no difference in the operation, so that the fastening of those two valves together by some rod or something, assuming that they were of the same relative specific gravity as the cement, couldn't make a bit of difference at all in the operation of the device, and it would be just the same as Defendant's Exhibit E, and assuming the two valves are of the same specific gravity, they would operate identically the same as Defendant's Exhibit E, as far as seating is concerned.

If they were both of the same specific gravity one would have to be unseated while the other one was seated.

There is no function or result or effect that is performed by these two valves 21 and 26 which is not performed by the device of Defendant's Exhibit E, so that the fastening together, or the fact that I have made the two valves, the upper and lower valves, in one piece, and fastened them together makes no difference in the mode of operation of the device as compared with this said Baker patent—not a bit."

The foregoing will also sufficiently refute counsel's attempt to play on the word "valves" at the top of page 20 of Appellee's Brief.

Near the bottom of page 19 of Appellee's Brief, counsel refer to Plaintiff's Exhibit 15 as indicating that Exhibit E was not understood by Crowell as coming within the terms of the license agreement. This is an erroneous interpretation of Plaintiff's Exhibit 15. Explanation of this statement in said Crowell letter is given by Mr. Crowell near the top of Tr. 248, as follows:

“Redirect Examination

By Mr. Westall:

As to what I started to explain as to what I meant by the statement in Plaintiff's Exhibit 15: 'Although I am licensed by the Baker Oil Tools, Inc., to operate patent 1,859,648, I am not doing so for reasons of my own': That meant that I was not manufacturing and selling it and stamping it with the Baker Oil Tool Company patent number on it. That I had basic patents of side port cementing equipment, with peripheral valves.

As to why I did not want to indicate my operation under that patent by marking it patented with that number: Because I already had it covered by previous patents.”

There is no evidence that any of the other Baker patents cover “single valve devices” as asserted near the bottom of page 20 of Appellee's Brief. There is a clear admission by Mellin at Tr. 101 (quoted and discussed at page 45, Appellant's Opening Brief) that it was not necessary (at the time of negotiations leading up to the execution of the cross-licenses in question) “to discuss the other patents because that device [that Crowell intended to make] wouldn't come within any other Baker patents.”

In Our Opening Brief, Beginning Page 56a, We Believe We Have Thoroughly Refuted in Advance Counsel's Argument, Beginning Appellee's Brief, Page 34, as to the Actual Coverage by Baker Patent No. 1,859,648 of Defendant's Exhibit E.

The case of *Westinghouse v. Eastern Paper Bag Co.*, 170 U. S. 537, and others cited by counsel, are not applicable for the purpose of limiting broad claims such as claim 5 of said Baker patent to the precise structure shown in the drawings. There are both broad and narrow claims in said patent. Some of those claims, for instance, are clearly limited to ball valves. There is nothing in said patent suggesting that poppet type valves are included. Counsel's argument, as well as the actions of the parties in reading poppet type valves into said Baker patent, *concedes that broad claims not limited to any particular kind of valves may cover forms and constructions not at all described or shown in the patent.* The inference from counsel's citation of these cases is that nothing not shown or described in the Baker drainage is covered thereby. By their interpretation reading poppet type valves into said Baker patent, as an instance, they have recognized the elementary law that there is a range of equivalents and also that when a patentee claims one form of his device, he is entitled to all equivalent forms. There is nothing in claim 5, as an instance, of the Baker patent that requires separate and spaced apart valves, and the Court will note that about one-third down Tr. 104 Mellin admits that Crowell's double-acting valve is of the poppet type.

It is not true, as stated near the top of Appellee's Brief, page 35, that in our comparison with claim 5 of the

Baker patent (Appellant's Opening Brief, p. 56a) we have eliminated from the claim significant language, or that we have materially changed the wording of the claim. On the contrary, the language of the claim is followed almost literally. It is true that for the sake of clarity we have in several instances repeated certain significant words. For instance, the words "said valve" at 17 of said analysis, and again at 16, is repeated, but this obviously does not change the meaning; it only aids in more quickly understanding the application of each numeral. When counsel on page 35, Appellee's Brief, imply a contention that there must be two separate valve chambers connected by a constricted passage to comply with the language of said claim 5, they are inconsistent with Mr. Melin's attempts to have said Baker patent cover the device of Crowell's old abandoned application—which has only a single large chamber—not a constricted passage which would justify the description distinguishing between an "upper" and a "lower" valve chamber.

Crowell's cross-examination relating to the comparison of Exhibit E with said Baker patent is largely based upon an assumption that valves of said Baker patent are of *different specific gravities*. This is a false assumption. There is nothing in the Baker patent indicating any such different specific gravities. Note after Mr. Crowell's cross-examination the following redirect [Tr. 260]:

"Q. By Mr. Westall: Are the functions you have referred to, the differences in function, of any practical materiality in oil well cementing?

A. None whatever.

Q. As far as practical cementing is concerned, is there any difference in the function of the two valves 21 and 26 in your valve and the Defendant's Exhibit E?

A. Not a bit.

Q. So that the differences, the possible modes of operation, are not at all material?

A. Not at all material."

Counsel's description of the working of the device of said Baker patent (Appellee's Brief, p. 37) is based upon the same false assumption, namely, that there is a difference in specific gravity between the two valves. At the bottom of Tr. 117, Mellin on cross-examination discusses this difference in relative weights asserting that the lower valve (of said Baker patent) is of a specific gravity presumably greater than the specific gravity of the cement, while valve 21, the upper valve, is of a specific gravity less than the cement. In the middle of Tr. 119, Mellin testifies that said difference in specific gravity is important, and at the bottom of the same page, Mellin admits that the patent *contains no such disclosure*; that is to say, there is nothing in said Baker patent to indicate any such difference of specific gravities.

Contrary to the assertions of counsel (Appellee's Brief, p. 40) all material functions performed by the device of said Baker patent are performed by Defendant's Exhibit E. Counsel are hair-splitting on unimportant functions and are basing their description of operation on assumptions not supported by the Baker patent.

Fraud and Undue Influence.

We have nothing to add to our opening brief upon these matters. Quotations from the evidence there presented sufficiently refute the arguments contained in Appellee's Brief.

Respectfully submitted,

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